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SUPREME COURT, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 313

WALTER SELINGER,
Petitioner,

vs.

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

WALTER SELINGER,
vs.
Petitioner,

LESTER BIGLER, Special Agent of the Internal Revenue Service, et al.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 27, 1967.

OPINIONS BELOW

The opinion of the District Court is reported in 260 F. Supp. 476 (D. Ariz., 1966). The opinion of the Court of Appeals has not been reported.

JURISDICTION

The judgment of the Court of Appeals was made and entered on April 27, 1967. A petition for rehearing was filed within the time allowed, on May 24, 1967, and denied on May 31, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1), 62 Stat. 928.

QUESTION PRESENTED

If a taxpayer is not informed of his right to counsel before he is questioned by special agents of the Internal Revenue Service, whose only duty is to investigate criminal tax fraud, can any statements made by him or any records seized by the government be used against him?

CONSTITUTIONAL PROVISION INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (U.S.C.A. Const. Amend. VI).

STATEMENT OF THE CASE

Jurisdiction of the United District Court for the District of Arizona existed under Rule 41 (e), the Federal Rules of Criminal Procedure, 18 United States Code.

This action was brought by Walter Selinger in the form of a motion for the return of property and to suppress evidence under Rule 41 (e) of the Federal Rules of Criminal Procedure. Plaintiff's motion contended that a Special Agent of the Internal Revenue Service, and an Internal

Revenue Agent who accompanied the Special Agent, illegally photocopied Mr. Selinger's books, records and other memoranda in the course of a criminal income tax investigation of Mr. Selinger's business, a sole proprietorship. (R., Vol. I at 1).

These two representatives of the Treasury Department came to Mr. Selinger's place of business and asked to see him on the morning of October 20, 1965. Since Mr. Selinger was not in when the Agents arrived, Lester Bigler, a Special Agent in the Internal Revenue Service, called Mr. Selinger on the telephone. Mr. Bigler did not identify himself or tell Mr. Selinger why he wanted to see him, except that he did identify himself and Mr. Landesman as "Government Men". The Agents made an appointment with Mr. Selinger for 12:30 P.M. on the same day. When the Agents arrived, Mr. Selinger took them into his private office, where Mrs. Selinger was waiting. Mr. Bigler showed Mr. Selinger his credentials, which contained his photograph and indicated that he was a Special Agent with the United States Treasury Department. (R., Vol. I at 127-128). Special Agent Bigler did not inform Mr. Selinger of his function with the United States Treasury Department. (R., Vol. II at 9). Mr. Selinger had never had any prior dealings with Treasury Agents (R., Vol. II at 20), and he was not aware of the criminal functions of a Special Agent of the Internal Revenue Service. (R., Vol. I at 16).

Both Treasury Agents testified that they told Mr. Selinger who they were and what they wanted, and that Mr. Selinger agreed to let them see all of his business records. Both Mr. and Mrs. Selinger, as well as Selinger's bookkeeper, testified that permission to examine books and records was neither asked nor granted to the Treasury Agents. It is undisputed that neither Agent informed Mr.

Selinger of his right to counsel at any time during this interview. (Bigler deposition, page 10).

That same afternoon, both Agents went to the office of Sidney Markow, Mr. Selinger's accountant, and photocopied all of Mr. Selinger's records that were in the accountant's possession. On the following day, October 21, 1965, the Agents returned to Mr. Selinger's place of business and photocopied many of his remaining records. (R., Vol. I at 128). When Mr. Selinger subsequently learned that the Agents had returned and were copying his records, he contacted a business friend who requested a tax attorney, Harold W. Wales, to contact Mr. Selinger. After speaking briefly with Mr. Selinger, Mr. Wales then talked to Mr. Bigler and, as a result, Mr. Bigler agreed to leave the premises. (R., Vol. II at 17-19).

The District Court denied the motion for the return of property and to suppress evidence. The Order was affirmed by the Court of Appeals, and a petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

1. In *Escobedo v. Illinois,* 378 U.S. 478, 84 S.Ct. 1758, 12 L. Ed. 2d 977 (1964), the Supreme Court of the United States held that an individual has the right to the assistance of counsel under the 6th Amendment to the United States Constitution when a criminal investigation begins to focus on a particular suspect. In the instant case, the investigation focused on Mr. Selinger when Special Agent Bigler was assigned to investigate Mr. Selinger for possible violations of the criminal tax laws. When Mr. Bigler was so assigned, the investigation was "no longer a general inquiry into an unsolved crime" because Mr. Selinger, and only Mr. Selinger, was suspected of violating the criminal tax laws.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed. 694 (1966), the Supreme Court held that "prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (16 L.Ed. 2d 694 at 706-707).

The question to be decided is whether *Escobedo* and *Miranda* are equally applicable to criminal tax matters. The philosophy and rational of *Escobedo* and *Miranda* are that an individual should be apprised of his right to counsel whenever the investigation is no longer a general one but focuses upon a particular individual. In a typical non-tax criminal case, the investigation does not focus on the accused until after there has been a determination made that a crime has been committed and there has been a search for individuals suspected of committing the crime. In such cases, the right to counsel normally attaches when the suspect is first interrogated by the police.

In a criminal tax fraud case, the investigation focuses on a particular taxpayer immediately, but necessarily before there is complete evidence that a crime has been committed. When a Special Agent has been assigned to a case, there is, and remains, only one suspect. When the Special Agent discovers proof that a crime has been committed, this is also proof that the particular taxpayer is guilty of it.

Under the Treasury Regulations,[1] the textual material written on the subject,[2] and under the provisions of the

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1. Reg. 1118.6, Statement of Organization and Functions of Intelligence Division, CCH 1965 Standard Federal Reporter, Paragraph 5988 (March 24, 1965).

2. Weiss and Balter, "Special Agents Need Not Advise a Taxpayer of His Constitutional Rights," *The Journal of Taxation* (July 1966) at pages 26, 27.

Burns, *Searches and Seizures: The Suppression of Evidence*, N.Y.U. 20th Institute on Federal Tax 1081, 1087 (1962).

Internal Revenue Agent's Manual, it is clear that the sole function of a Special Agent of the Intelligence Division is to seek evidence of crimes. The manual itself provides:

> "That upon the entry of a Special Agent it becomes a new investigation of a 'criminal' nature and the civil tax liability is no longer involved. The Internal Revenue agent's manual specifically provides that the civil investigation is suspended."[3]

If the rationale of *Miranda* is to have any meaning at all in a tax fraud investigation, the taxpayer must be informed of his right to counsel whenever a Special Agent of the Internal Revenue Service enters the case. The critical time for the advice of an attorney is when a Special Agent interrogates a taxpayer and seeks permission to examine his books and records. This is the crucial point when the taxpayer most needs to be informed of the consequences of allowing a Special Agent to inspect and photocopy his records. After the books and records of the taxpayer have been examined by specially trained revenue agents, the evidence necessary to convict a taxpayer will normally have been obtained. Thus, to inform the taxpayer of his right to counsel at some later time would be a useless gesture.[4]

Any evidence obtained from a taxpayer should be admissible only if the taxpayer furnished it after knowingly and voluntarily waiving his constitutional rights and privileges. As pointed out recently in a comprehensive opinion on the subject, the District Court in *U.S. v. Turzynski*, 67-2 USTC par. 9489 (N.D.Ill. 1967), stated:

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3. *U. S. v. Schoenborg*, 19 AFTR 2d 347, 351 (D.Ariz. 1966).

4. See, generally, James O. Hewitt, "6th Amendment Rights of the Taxpayer in a Fraud Investigation", Bulletin of the Section of Taxation, American Bar Association, January, 1966; Paul P. Lipton, "Constitutional Rights in Criminal Tax Investigations", 53 A.B.A.J. 517 (1967).

"To hold otherwise would lead to the anomalous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the Internal Revenue laws. For when the final transition from civil to criminal investigation takes place in a tax case, the taxpayer being investigated and asked to furnish his books and records, is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes.

"In the last analysis, the test enunciated by recent decisions is whether a suspect has voluntarily waived his constitutional rights and privileges. The Supreme Court has logically pointed out that it is impossible voluntarily to waive a right or privilege you are unaware you possess. *Miranda v. Arizona,* 384 U.S. 436, at 462."

This same Court went on to state that in some respects the tax investigation is more insidious and dishonest than a custodial investigation, because the suspect in custody knows his interrogators are seeking evidence to convict him of a crime while the tax suspect is permitted and even encouraged to believe that no criminal prosecution is in contemplation.

Since the Supreme Court's decision in *Miranda,* a substantial number of courts have considered the issue involved in this petition for certiorari.[5] These courts rely, in most

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5. *United States v. Spomar,* 339 F. 2d 941 (7 Cir. 1965);
Kohatsu v. United States, 351 F. 2d 898 (9 Cir. 1965);
Rickey v. United States, 360 F. 2d 33 (9 Cir. 1966);
United States v. Fiore, 258 F. Supp. 435 (W.D.Pa. 1966);
United States v. Carlson, 260 F. Supp. 423 (E.D.N.Y. 1966);
United States v. Hill, 260 F. Supp. 139 (S.D.Cal. 1966);
Schlinsky v. United States, 67-2 USTC par. 9493 (1 Cir. 1967);
Morgan v. United States, 67-1 USTC par. 9449 (1 Cir. 1967);

instances, on an interpretation of *Miranda* which concludes that the latter decision only applies to situations where a suspect is in the custody of the police or is deprived of his physical freedom in some significant way.

Petitioner submits that the *Miranda* decision did not limit the right to counsel to a person in custody since the court recognized that an individual could convict himself by waiving his constitutional rights before the "in custody" status had been reached. Moreover, as pointed out in the *Turzynski* case, the Supreme Court in *Miranda* set forth the broad principle that when the investigative power of the Government is directed toward an individual with the intent to obtain incriminating evidence from him, the individual should be afforded an opportunity knowledgeably to exercise his constitutional rights. It is actually because a person cannot knowledgeably exercise his rights unless he is aware of them that the multiple warning requirement was established.

The Petitioner's Writ of Certiorari should be granted because of the decision of the Ninth Circuit is in conflict with *Escobedo* and *Miranda*. An individual should be informed of his right to counsel when a criminal investigation reaches the accusatory stage. In a criminal tax fraud investigation, this stage is reached when a Special Agent first interrogates the taxpayer who is suspected of defrauding the Government.

2. The Petitioner's Writ of Certiorari should be granted because of the importance of the issue and principle

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Mathis, Sr. v. United States, 67-1 USTC par. 9408 (5 Cir. 1967);
Moon v. Brennan, 19 AFTR 2d 641 (1966);
United States v. Rabin, 67-1 USTC par. 9465 (1967);
United States v. Neves, 67-1 USTC par. 9412 (1967).

involved. Two other Circuit Courts of Appeal[6] have decided that *Miranda* is inapplicable to a criminal tax fraud case, and several additional Circuit Courts of Appeal will be deciding this issue within the immediate future. In light of the number of courts that have been asked to rule on this issue,[7] and in light of its importance, the Supreme Court should consider this case at this time to preclude further litigation and uncertainty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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6. *Schlinsky v. United States, Infra.*
Mathis, Sr. v. United States, Infra.

7. See cases collected in footnote 5.

(Appendix Follows)

Appendix

In the United States District Court
for the District of Arizona

No. Civil 5792—Phoenix

Walter Selinger,
Petitioner,

vs.

Lester Bigler, Special Agent of the Internal Revenue Service, and Robert Landesman, Internal Revenue Agent,
Defendants.

OPINION AND ORDER

This cause came before this Court by means of a pre-indictment pleading under Federal Rules of Criminal Procedure 41(e). Petitioner and movant, Walter Selinger, filed a Motion for Return of Property and to Suppress Evidence, alleging that the defendants—one a Special Agent of the Internal Revenue Service, and the other an Internal Revenue Agent, had illegally photocopied petitioner's books, records, and other memoranda in the course of an income tax investigation of petitioner's business, a sole proprietorship.

Specifically, the petitioner asked the Court for an Order directing that the photocopies made by the defendants be returned and that their use for any proceeding, whether civil, criminal, or administrative, be suppressed. At the same time, petitioner asked for a temporary restraining

order seeking to enjoin defendants from proceeding further with any investigation based on the records alleged to have been illegally photocopied.

A temporary Restraining Order was granted and an Order to Show Cause hearing was set to determine the disposition of petitioner's Motion to Suppress Evidence and For Return of Property. Thereafter, and before the hearing was held on petitioner's Motion, the United States Attorney, acting on behalf of the defendants, moved the Court for an Order dismissing the proceedings, alleging three grounds in support of this Motion:

1. The petitioner's Motion was anticipatory and premature in that no criminal proceeding existed by which Rule 41(e) of the Federal Rules of Criminal Procedure could be invoked.

2. The Court lacked jurisdiction over the subject matter.

3. Petitioner's Motion fails to state a cause of action on which relief could be granted.

The Court took the Government's Motion to Dismiss under advisement and proceeded with the hearing.

At the hearing, the testimony showed that, on the morning of October 20, 1965, the two Revenue Agents came to Mr. Selinger's place of business and asked to see him. Mr. Selinger was not in at that time; however, one of his employees contacted him by telephone and Mr. Selinger talked over the phone to one of the agents, Lester Bigler, Special Agent of the Internal Revenue Service. Other than identifying themselves as "government men", Mr. Bigler gave no further indication to Mr. Selinger as to their identity or their reason for wanting to see him. In any case, they arranged to meet at Mr. Selinger's place of business at 12:30 P.M. on that day. Mr. Selinger was in his place of business when the two agents arrived and he took them into his

private office, where Mr. Bigler showed Mr. Selinger his identification card, which contained his photograph and indicated that he was a Special Agent with the United States Treasury Department. Mrs. Renee Selinger, the petitioner's wife, was also present during the entire period and Rudy Boehmer, Mr. Selinger's Office Manager, for a brief period during the interview.

There is substantial disagreement as to what was said by each of the parties at this time. The defendants contend that, while they were talking to Mr. Selinger in his office, they told him who they were and what they wanted, and that he agreed to let them see all of his business records, which, for the most part, were in the possession of Mr. Selinger's accountant, Mr. Sidney Markow. Mr. Selinger denies that he ever gave permission to the agents to see his records.

The two agents went to the office of Mr. Selinger's accountant, Sidney Markow, that afternoon and photocopied all of Selinger's records that were in his possession. The next day, they returned to Mr. Selinger's place of business and photocopied many of the remaining records. It is all of these records, so photocopied, that petitioner claims were illegally obtained and whose use in evidence he seeks to suppress with a return to him of all records photocopied.

The oral testimony consisted of an initial two day hearing, held on December 13 and 14, 1965, and additional hearings which were held on January 7 and 14, 1966. In addition to this, depositions were taken of most of the principal witnesses prior to the hearings, which began in December.

After considering all of this testimony, together with the exhibits, the Court is of the opinion that defendants' Motion to Dismiss should be denied, and it is so ordered. Certainly, if the facts, as alleged by the petitioner, were true, namely,